

AMENDED IN SENATE MAY 22, 2006

AMENDED IN SENATE FEBRUARY 15, 2006

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AMENDED IN ASSEMBLY MAY 2, 2005

CALIFORNIA LEGISLATURE—2005–06 REGULAR SESSION

ASSEMBLY BILL

No. 1302

Introduced by Assembly Member Jerome Horton

February 22, 2005

An act to amend Sections ~~11346.1 and 11349.6 of, and 11340.85, 11346.1, 11349.6, and 11350 of,~~ to add Section 11342.545 to, *and to repeal Section 11017.6 of,* the Government Code, relating to state agencies.

LEGISLATIVE COUNSEL'S DIGEST

AB 1302, as amended, Jerome Horton. Office of Administrative Law: regulations.

Existing law provides that, if a state agency makes a finding that the adoption of a regulation or order of repeal is necessary for the immediate preservation of the public peace, health and safety or general welfare, the regulation or order of repeal may be adopted as an emergency regulation or order of repeal. Under existing law, a regulation, amendment, or order of repeal adopted as an emergency regulation remains in effect no more than 120 days unless the adopting agency ~~complies and the Office of Administrative Law comply~~ with certain requirements.

This bill would require an agency that is adopting an emergency regulation to ~~mail~~ *send* at least 5 working days prior to submission of

an emergency regulation to the office a notice of proposed emergency action to every person who has filed a request for notice of regulatory action with the agency unless the emergency situation clearly poses such an immediate, serious harm that delaying action to allow public comment would be inconsistent with the public interest. The bill would extend to 180 days the maximum period of time a regulation, amendment, or order of repeal initially adopted as an emergency regulation would remain in effect. The bill would authorize the office to approve ~~one re-adoption~~ *not more than 2 readoptions* of an emergency regulation, *each* for a period not to exceed 90 days, as specified. The bill would require the office, after posting a notice of the filing of a proposed regulation on its Internet Web site, to allow interested persons 5 calendar days to submit comments on the proposed emergency regulations unless delaying action to allow public comment would be inconsistent with the public interest. *It would make these changes applicable to emergency regulations first submitted to the office on or after January 1, 2007.*

The bill also would authorize a state agency to deliver a notice required or authorized under these provisions by electronic mail.

Existing law requires state agencies to prepare, by January 30 of each year, a rulemaking calendar with specified information about rulemakings necessary to implement statutes.

This bill would repeal these provisions.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 11017.6 of the Government Code is
2 repealed.
3 ~~11017.6. Every state agency responsible for implementing a~~
4 ~~statute which requires interpretation pursuant to the~~
5 ~~Administrative Procedure Act shall prepare, by January 30 of~~
6 ~~each year, a rulemaking calendar for that year. The rulemaking~~
7 ~~calendar shall be prepared in accordance with a format specified~~
8 ~~by the office, approved by the head of the department or, if the~~
9 ~~rulemaking agency is an entity other than a department, by the~~
10 ~~officer, board, commission, or other entity which has been~~
11 ~~delegated the authority to adopt, amend, or repeal regulations,~~
12 ~~and published in the California Regulatory Notice Register. The~~

1 preparation of the rulemaking calendar shall not preclude
2 adoption of a regulation that is not included in the rulemaking
3 calendar but which is required by circumstances not reasonably
4 anticipated at the time that the rulemaking calendar is prepared.

5 The rulemaking calendar shall consist of two schedules as
6 follows:

7 (a) A schedule which describes the rulemaking necessary to
8 implement statutes enacted during the previous year. The
9 schedule shall include the projected dates on which the agency
10 plans to:

11 (1) Publish the notice of proposed action for each rulemaking.

12 (2) Schedule a public hearing if one is required or requested.

13 (3) Adopt the regulations.

14 (4) Submit the regulations to the office for review.

15 In addition, the schedule shall identify the organizational unit
16 within the agency which is responsible for each rulemaking and
17 the name and telephone number of the agency officer to whom
18 inquiries concerning the rulemaking may be directed.

19 (b) A schedule which describes all other rulemaking the
20 agency plans to propose, to implement or interpret other statutes
21 enacted during years prior to the previous year. The schedule
22 shall contain the same information concerning rulemaking as is
23 required in the schedule prepared under subdivision (a), and a
24 report on the status of all uncompleted rulemaking that was
25 described on previous calendars.

26 In addition to publishing the rulemaking calendar in the
27 California Regulatory Notice Register, state agencies subject to
28 this section shall send the calendar to the author of each statute
29 enacted during the previous year for which the agency has
30 responsibility, together with an explanation of the priority the
31 agency has given the statute in the rulemaking calendar.

32 *SEC. 2. Section 11340.85 of the Government Code is*
33 *amended to read:*

34 11340.85. (a) As used in this section, "electronic
35 communication" includes electronic transmission of written or
36 graphical material by electronic mail, facsimile, or other means,
37 but does not include voice communication.

38 (b) Notwithstanding any other provision of this chapter that
39 refers to mailing *or sending*, or to oral or written communication:

1 (1) An agency may permit and encourage use of electronic
2 communication, but may not require use of electronic
3 communication.

4 (2) An agency may publish or distribute a document required
5 by this chapter or by a regulation implementing this chapter by
6 means of electronic communication, but shall not make that the
7 exclusive means by which the document is published or
8 distributed.

9 (3) A notice required or authorized by this chapter or by a
10 regulation implementing this chapter may be delivered to a
11 person by means of electronic communication if the person has
12 expressly indicated a willingness to receive the notice by means
13 of electronic communication.

14 (4) *If a person has provided an electronic mail address to a*
15 *state agency, the agency may deliver a notice required or*
16 *authorized by this chapter or by a regulation implementing this*
17 *chapter by means of electronic mail to that address. If the agency*
18 *is notified that the notice provided by electronic mail was not*
19 *delivered, it shall immediately deliver the notice by postal mail.*

20 ~~(4)~~

21 (5) A comment regarding a regulation may be delivered to an
22 agency by means of electronic communication.

23 ~~(5)~~

24 (6) A petition regarding a regulation may be delivered to an
25 agency by means of electronic communication if the agency has
26 expressly indicated a willingness to receive a petition by means
27 of electronic communication.

28 (c) An agency that maintains an Internet Web site or other
29 similar forum for the electronic publication or distribution of
30 written material shall publish on that Web site or other forum
31 information regarding a proposed regulation or regulatory repeal
32 or amendment, that includes, but is not limited to, the following:

33 (1) Any public notice required by this chapter or by a
34 regulation implementing this chapter.

35 (2) The initial statement of reasons prepared pursuant to
36 subdivision (b) of Section 11346.2.

37 (3) The final statement of reasons prepared pursuant to
38 subdivision (a) of Section 11346.9.

39 (4) Notice of a decision not to proceed prepared pursuant to
40 Section 11347.

1 (5) The text of a proposed action or instructions on how to
2 obtain a copy of the text.

3 (6) A statement of any decision made by the office regarding a
4 proposed action.

5 (7) The date a rulemaking action is filed with the Secretary of
6 State.

7 (8) The effective date of a rulemaking action.

8 (9) A statement to the effect that a business or person
9 submitting a comment regarding a proposed action has the right
10 to request a copy of the final statement of reasons.

11 (10) The text of a proposed emergency adoption, amendment,
12 or repeal of a regulation pursuant to Section 11346.1 and the date
13 it was submitted to the office for review and filing.

14 (d) A document that is required to be posted pursuant to
15 subdivision (c) shall be posted within a reasonable time after
16 issuance of the document, and shall remain posted until at least
17 15 days after (1) the rulemaking action is filed with the Secretary
18 of State, or (2) notice of a decision not to proceed is published
19 pursuant to Section 11347. Publication under subdivision (c)
20 supplements any other required form of publication or
21 distribution. Failure to comply with this section is not grounds
22 for disapproval of a proposed regulation. Subdivision (c) does
23 not require an agency to establish or maintain a Web site or other
24 forum for the electronic publication or distribution of written
25 material.

26 (e) Nothing in this section precludes the office from requiring
27 that the material submitted to the office for publication in the
28 California Code of Regulations or the California Regulatory
29 Notice Register be submitted in electronic form.

30 (f) This section is intended to make the regulatory process
31 more user-friendly and to improve communication between
32 interested parties and the regulatory agencies.

33 **SECTION 1.**

34 *SEC. 3.* Section 11342.545 is added to the Government Code,
35 to read:

36 ~~11342.545. For purposes of adopting a regulation pursuant to~~
37 ~~Section 11346.1, “emergency” means a situation not foreseen in~~
38 ~~sufficient time to proceed in accordance with the provisions of~~
39 ~~Article 5 (commencing with Section 11346) that apply to~~
40 ~~nonemergency regulations and~~

1 11342.545. “Emergency” means a situation that calls for
2 immediate action to avoid serious harm evidenced by an
3 imminent and substantial threat to the public peace, health,
4 safety, or general welfare.—“Emergency” does not mean
5 expediency, convenience, best interest, or general public need,
6 and it cannot be based on speculation.

7 ~~SEC. 2.~~

8 SEC. 4. Section 11346.1 of the Government Code is amended
9 to read:

10 11346.1. (a) (1) The adoption, amendment, or repeal of an
11 emergency regulation is not subject to any provision of this
12 ~~chapter except this section and Section 11349.6. article except~~
13 ~~this section.~~

14 (2) At least five working days before submitting an emergency
15 regulation to the office, the adopting agency shall, except as
16 provided in paragraph (3), ~~mail send~~ a notice of the proposed
17 emergency action to every person who has filed a request for
18 notice of regulatory action with the agency. The notice shall
19 ~~describe all of the following; include both of the following:~~

- 20 (A) ~~The proposed regulatory action.~~
21 (B) ~~The specific regulatory language proposed to be adopted.~~
22 (C) ~~The factual and evidentiary basis for the emergency and~~
23 ~~the need for immediate action.~~
24 (D) ~~The statutory authority for adopting the regulation.~~
25 (E) ~~The law being implemented, interpreted, or made specific.~~
26 (F) ~~The basis for proposing the specific regulation to address~~
27 ~~the emergency.~~

- 28 (A) *The specific language proposed to be adopted.*
29 (B) *The finding of emergency required by subdivision (b).*

30 (3) An agency is not required to provide notice pursuant to
31 paragraph (2) if the emergency situation clearly poses such an
32 immediate, serious harm that delaying action to allow public
33 comment would be inconsistent with the public interest.

34 (b) (1) Except as provided in subdivision (c), if a state agency
35 makes a finding that the adoption of a regulation or order of
36 repeal is necessary ~~for the immediate preservation of the public~~
37 ~~peace, health and safety or general welfare to address an~~
38 ~~emergency~~, the regulation or order of repeal may be adopted as
39 an emergency regulation or order of repeal.

1 (2) Any finding of an emergency shall include a written
2 statement that contains the information required by paragraphs
3 (2) to (6), inclusive, of subdivision (a) of Section 11346.5 and a
4 description of the specific facts demonstrating the existence of an
5 emergency and the need for immediate action, and
6 demonstrating, by substantial evidence, the need for the proposed
7 regulation to effectuate the statute being implemented,
8 interpreted, or made specific and to address only the
9 demonstrated emergency. The finding of emergency shall also
10 identify each technical, theoretical, and empirical study, report,
11 or similar document, if any, upon which the agency relies. The
12 enactment of an urgency statute shall not, in and of itself,
13 constitute a need for immediate action.

14 *A finding of emergency based only upon expediency,*
15 *convenience, best interest, general public need, or speculation,*
16 *shall not be adequate to demonstrate the existence of an*
17 *emergency. If the situation identified in the finding of emergency*
18 *existed and was known by the agency adopting the emergency*
19 *regulation in sufficient time to have been addressed through*
20 *nonemergency regulations adopted in accordance with the*
21 *provisions of Article 5 (commencing with Section 11346), the*
22 *finding of emergency shall include facts explaining the failure to*
23 *address the situation through nonemergency regulations.*

24 (3) The statement and the regulation or order of repeal shall be
25 filed immediately with the office.

26 (c) Notwithstanding any other provision of law, no emergency
27 regulation that is a building standard shall be filed, nor shall the
28 building standard be effective, unless the building standard is
29 submitted to the California Building Standards Commission, and
30 is approved and filed pursuant to Sections 18937 and 18938 of
31 the Health and Safety Code.

32 (d) The emergency regulation or order of repeal shall become
33 effective upon filing or upon any later date specified by the state
34 agency in a written instrument filed with, or as a part of, the
35 regulation or order of repeal.

36 (e) No regulation, amendment, or order of repeal initially
37 adopted as an emergency regulatory action shall remain in effect
38 more than 180 days unless the adopting agency has complied
39 with Sections 11346.2 to 11347.3, inclusive, either before
40 adopting an emergency regulation or within the 180-day period.

1 The adopting agency, prior to the expiration of the 180-day
2 period, shall transmit to the office for filing with the Secretary of
3 State the adopted regulation, amendment, or order of repeal, the
4 rulemaking file, and a certification that Sections 11346.2 to
5 11347.3, inclusive, were complied with either before the
6 emergency regulation was adopted or within the 180-day period.

7 (f) If an emergency amendment or order of repeal is filed and
8 the adopting agency fails to comply with subdivision (e), the
9 regulation as it existed prior to the emergency amendment or
10 order of repeal shall thereupon become effective and after notice
11 to the adopting agency by the office shall be reprinted in the
12 California Code of Regulations.

13 (g) If a regulation is originally adopted and filed as an
14 emergency and the adopting agency fails to comply with
15 subdivision (e), this failure shall constitute a repeal of the
16 regulation and after notice to the adopting agency by the office,
17 shall be deleted.

18 (h) The office shall ~~not file~~ *disapprove* an emergency
19 regulation ~~with the Secretary of State~~ if the emergency regulation
20 is the same as or substantially equivalent to an emergency
21 regulation previously adopted by that agency, unless the office
22 expressly approves the agency's readoption of the emergency
23 regulation. The office may approve ~~one readoption of the~~
24 ~~emergency regulation for a period not to exceed 90 days not~~
25 ~~more than two readoptions, each for a period not to exceed 90~~
26 ~~days. Readoption shall be permitted only~~ if the agency has made
27 substantial progress and proceeded with diligence to comply with
28 subdivision (e).

29 ~~SEC. 3.~~

30 *SEC. 5.* Section 11349.6 of the Government Code is amended
31 to read:

32 11349.6. (a) If the adopting agency has complied with
33 Sections 11346.2 to 11347.3, inclusive, prior to the adoption of
34 the regulation as an emergency, the office shall approve or
35 disapprove the regulation in accordance with this article.

36 (b) Emergency regulations adopted pursuant to subdivision (b)
37 of Section 11346.1 shall be reviewed by the office within 10
38 calendar days after their submittal to the office. After posting a
39 notice of the filing of a proposed emergency regulation on its
40 Internet Web site, the office shall allow interested persons five

1 calendar days to submit comments on the proposed emergency
2 regulations unless the emergency situation clearly poses such an
3 immediate serious harm that delaying action to allow public
4 comment would be inconsistent with the public interest. The
5 office shall not file the emergency regulations with the Secretary
6 of State if it determines that the regulation is not necessary for
7 the immediate preservation of the public peace, health and safety,
8 or general welfare. *office shall disapprove the emergency*
9 *regulations if it determines that the situation addressed by the*
10 *regulations is not an emergency*, or if it determines that the
11 regulation fails to meet the standards set forth in Section
12 11349.1, or if it determines the agency failed to comply with
13 Section 11346.1.

14 (c) If the office considers any information not submitted to it
15 by the rulemaking agency when determining whether to file
16 emergency regulations, the office shall provide the rulemaking
17 agency with an opportunity to rebut or comment upon that
18 information.

19 (d) Within 30 working days of the filing of a certificate of
20 compliance, the office shall review the regulation and hearing
21 record and approve or order the repeal of an emergency
22 regulation if it determines that the regulation fails to meet the
23 standards set forth in Section 11349.1, or if it determines that the
24 agency failed to comply with this chapter.

25 *SEC. 6. Section 11350 of the Government Code is amended to*
26 *read:*

27 11350. (a) Any interested person may obtain a judicial
28 declaration as to the validity of any regulation or order ~~or of~~
29 repeal by bringing an action for declaratory relief in the superior
30 court in accordance with the Code of Civil Procedure. The right
31 to judicial determination shall not be affected by the failure either
32 to petition or to seek reconsideration of a petition filed pursuant
33 to Section 11340.7 before the agency promulgating the regulation
34 or order of repeal. The regulation or order of repeal may be
35 declared to be invalid for a substantial failure to comply with this
36 chapter, or, in the case of an emergency regulation or order of
37 repeal, upon the ground that the facts recited in the ~~statement~~
38 *finding of emergency* prepared pursuant to subdivision (b) of
39 Section 11346.1 do not constitute an emergency within the
40 provisions of Section 11346.1.

(b) In addition to any other ground that may exist, a regulation or order of repeal may be declared invalid if either of the following exists:

(1) The agency's determination that the regulation is reasonably necessary to effectuate the purpose of the statute, court decision, or other provision of law that is being implemented, interpreted, or made specific by the regulation is not supported by substantial evidence.

(2) The agency declaration pursuant to paragraph (8) of subdivision (a) of Section 11346.5 is in conflict with substantial evidence in the record.

(c) The approval of a regulation or order of repeal by the office or the Governor's overruling of a decision of the office disapproving a regulation or order of repeal shall not be considered by a court in any action for declaratory relief brought with respect to a regulation or order of repeal.

(d) In a proceeding under this section, a court may only consider the following evidence:

(1) The rulemaking file prepared under Section 11347.3.

(2) The ~~written statement~~ *finding of emergency* prepared pursuant to subdivision (b) of Section 11346.1.

(3) An item that is required to be included in the rulemaking file but is not included in the rulemaking file, for the sole purpose of proving its omission.

(4) Any evidence relevant to whether a regulation used by an agency is required to be adopted under this chapter.

SEC. 7. The changes made by this act applicable to emergency regulations shall apply only to regulations first submitted to the Office of Administrative Law on or after January 1, 2007.